No. 849

In the Supreme Court of the United States

OCTOBER TERM, 1947

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR, PETITIONER

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The District Court of the United States for the District of Columbia filed no opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 55–59) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1947 (R. 59). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a suit brought against the head of the War Assets Administration, an unincorporated nonsuable government agency charged with the disposition of surplus government property, to enjoin disposition of coal possessed by the United States and to which the United States claims title, is an unconsented suit against the United States which should be dismissed on the complaint for want of jurisdiction, where the plaintiff's sole claim is that the United States contracted to sell the coal to plaintiff, that title thereto passed before delivery or payment, and that delivery of the coal was wrongfully withheld from plaintiff

after a dispute as to the plaintiff's compliance with the contract terms.[2]

STATUTE INVOLVED

Section 15 of the Surplus Property Act of 1944, Act of October 3, 1944, c. 479, 58 Stat. 765, 772–773, 50 U. S. C. App., Supp. V, 1615, provides as follows:

> SEC. 15. (a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper: *Provided, however,* That in the case of raw materials, consumer goods, and small tools, hardware, and nonassembled articles which may be used in the manufacture of more than one type of product, no extension of credit under this Act shall be for a longer period than three years.
>
> (b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in prop-

[2] In the event that the petition for a writ of certiorari is granted, petitioner will also urge that the Court of Appeals erred in holding that respondent's remedy at law was inadequate, and that "the peculiar nature of the coal involved soundly bases appellant's resort to equity for relief" (R. 58).

erty or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.[3]

STATEMENT

This suit was instituted by a complaint for an injunction and a declaratory judgment filed on April 29, 1947, in the District Court of the United States for the District of Columbia (R. 1–32). The facts alleged in the complaint and appearing in the exhibits thereto were as follows:

Respondent is a Delaware corporation, with its principal office in Washington, D. C., engaged in the export and import business, particularly in coal (R. 2). During 1946, it had purchased from the War Assets Administration, at a price of $1.75 per ton, government-owned war surplus coal located at various Army camps in Texas and adjacent states, which respondent then sold for export (R. 2). On March 11, 1947, the War Assets Administration, through its Dallas Regional Office, invited a bid from respondent for another 10,000 tons of government-owned bituminous coal, stating "This coal is offered F. O. B. cars, Camp Maxey, north of Paris,

[3] The Act of September 18, 1945, c. 368, 59 Stat. 533, 50 U. S. C. App., Supp. V, 1614a–1614b, transferred the powers, authority, and duty of the Surplus Property Board to a Surplus Property Administrator.

Texas" (R. 2–3, 11). On March 13, 1947 respondent telegraphed its offer to purchase the coal "on same terms and conditions and made a continuing part of our recent contract at same price"; it indicated the coal was to be exported, and proposed that "contract shall be on cash basis based on railroad scale weights as heretofore and payment made upon presentation of your invoices to same bank in Dallas" (R. 3, 12). War Assets Administration's answering letter, of March 19, accepted the offer of $1.75 per ton, and also "your terms of placing $17,500 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank," adding that respondent might prefer to deposit the $17,500 with War Assets' Dallas office for deductions as shipments were made, any balance to be refunded to respondents (R. 3, 13).

Respondent then executed War Assets' forms of "Offer to Purchase" and "Sales Memorandum" (R. 3, 14–17). The standard conditions of sale contained in both of these documents stated that "Unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check, cashier's check, or money order prior to shipment of the property or its removal by Purchaser" (R. 15, 17), and also that "Unless otherwise specifically stated in the Sales Memorandum, all sales are made f. o. b. common carrier (cars or trucks) and shipping expenses will be paid by Purchaser"

(R. 15, 17). The face of the Sales Memorandum signed by respondent also contained the following typewritten statement in the box labeled "Terms": "Cash on presentation of wt. tickets as shipped" (R. 16).[4]

Respondent forwarded these executed documents to War Assets' Dallas office by letter of March 28, 1947, in which it stated that $5,000 (apparently furnished by the Penn-Pocahontas Coal Company, of New York, who were to export the coal) was that day being deposited with the designated Dallas bank "to apply against the first shipments of this coal," and that "immediately this shipment begins to move, the balance of the funds necessary to meet your invoices upon presentation at the bank will be transferred by the New York bank to the First National Bank of Dallas" (R. 3–4, 18). In immediate response, War Assets wired on April 1st that "First Na-

[4] The "Offer to Purchase" and the "Sales Memorandum" also provided, among other things, that (a) the Sales Memorandum and its standard conditions of sale constituted the entire agreement and extrinsic variations, modifications, or representations made by the seller's agents were to be of no effect; (b) on default by the buyer in making payment or otherwise, War Assets might on ten days notice rescind the sale or resell for the purchaser's account; (c) risk of loss shall be upon the purchaser if he fails to issue shipping instructions or to remove the goods on time, and upon the seller if the loss occurs prior to timely removal (but the seller's liability was limited to replacement of the property or return of the amount paid); and (d) War Assets reserved the right to cancel the contract where the purchaser was an agent for an undisclosed principal (R. 15, 17).

tional Bank Dallas refuses to guarantee payment for full amount unless $17,500 is on deposit their bank for this purpose. Unless $17,500 is deposited First National Bank Dallas for payment of total quantity this coal by noon April 4 sale will be cancelled and other disposition made" (R. 4, 20).

On April 4th, respondent telegraphed War Assets that it had placed with the Dallas bank a "letter of credit covering the balance of $12,500" and "this places on hand in the First National Bank Dallas the full amount of $17,500 to meet this purchase" (R. 4, 22). The same day, War Assets' Dallas regional office wired back that unless $17,500 was deposited with that office or on deposit with the Dallas bank, the telegram was to serve as formal notice that the sale would be cancelled ten days from that date (R. 4–5, 23). On inquiry by respondent from the Dallas bank as to why the letter of credit did not satisfy the Government, the bank wired, on April 10th, that the actual credit from the New York Corn Exchange Bank had not yet been received and War Assets was awaiting its arrival. The telegram also stated that War Assets "express preference for funds to be placed here for payment invoices rather than availability against sight drafts on New York bank" (R. 5, 24). The Dallas bank's confirmatory letter, likewise on April 10th, reiterated that War Assets "prefer that the funds should be made available to them here at this bank rather than waiting for a sight draft drawn

under a letter of credit to be paid in New York." The bank added that, if the New York bank requested it to do so, it would pay the drafts in Dallas "without this bank assuming any responsibility whatsoever * * * but we do not care to assume any responsibility for the payment of the drafts in New York City" (R. 25).

Respondent then had the letter of credit issued by the Corn Exchange Bank, which originally provided for payment of drafts in New York, as War Assets and the Dallas bank correctly understood (R. 5, 26), amended so as to permit payment in Dallas, not later than June 7th, 1947 (R. 5, 27). But the War Assets Administration was informed, on April 16th, by the Dallas bank that it had received a telegram from the New York bank stating that the amendment authorized the Dallas bank to *negotiate* the drafts and documents; the Dallas bank added that it now appeared to have the necessary authority to make *payment,* but only if the original letter of credit, as well as the invoices and proper shipping documents, were presented (R. 5, 28).[5] On the same day, War Assets wired respondent that its "credit division has been notified by First National Bank, Dallas, it does not have sufficient authority to

[5] On April 19, 1947, a correcting letter (not included in the record, was written by the Dallas bank to War Assets' Dallas office advising that on that day the bank had received a wire from the Corn Exchange Bank authorizing it to make payment, and not only to negotiate the drafts.

pay for this material upon presentation of invoices. This is formal notification sale is cancelled" (R. 5, 29).[3] Respondent immediately protested, claiming that it had complied with all contract requirements, and that a bona fide letter of credit had been established in accordance with the usual commercial procedure; it stated that it regarded the contract as still in effect (R. 6, 30–31). Respondent alleges that it received no replies to these telegrams of protest (R. 6).

Shortly thereafter, respondent was informed that the War Assets Administration had entered into a new contract to sell the coal in question to another concern, the Midland Coal Company, but that delivery had not been made at the time suit was brought (R. 6, 7). Respondent had itself, immediately after receiving War Assets' acceptance of March 19th, resold the coal to the Penn-Pocahontas Coal Company, at a price of $2.75 per ton plus 45% of any receipts in excess of $3.75 per ton on resale by Penn-Pocahontas (R. 7). The complaint also alleged that Penn-Pocahontas had meanwhile resold the coal to the Portuguese government, at a price between $8.50 and $9.00 per ton f. o. b. Texas port (R. 7).

The complaint concluded by averring that legal title to the coal had passed to respondent when War Assets accepted its purchase offer on March

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[3] The complaint nowhere alleges that War Assets Administration ever itself saw the letter of credit prior to cancellation. Cf. R. 38, 41, 42.

19, that respondent had fully complied with all the terms of the contract, that if it did not acquire the coal its standing with the trade and the Penn-Pocahontas Company would be lost, that it would lose its profits and be liable in damages to the repurchaser, and that because of the difficulty of ascertaining either damages or profits it had no adequate remedy at law (R. 6–8). The prayer was for a temporary restraining order, preliminary injunction, and permanent injunction prohibiting petitioner from cancelling the sale to respondent, and from reselling or delivering the coal to any other person; a declaration that the sale to respondent was still valid, and the later sale to Midland Coal Company invalid, was also asked (R. 8–9).

On the basis of the complaint, and a supporting affidavit of respondent's president generally affirming the complaint's allegations (R. 33–34), a temporary restraining order was issued *ex parte* on the day the complaint was filed (April 29, 1947), which restrained any disposition of the coal other than to respondent (R. 35–36). The matter of the issuance of a preliminary injunction was set for hearing on May 6, 1947 (R. 36).

On that day, petitioner moved to dismiss the complaint on the grounds (a) that the action was an unconsented suit against the United States for specific performance of a contract to sell coal, and (b) that the complaint failed to state a

claim upon which relief might be granted (R. 36–37). Petitioner also filed an affidavit of Walter N. Day, Director of the Credit Division of War Assets, to the effect that (i) it was the War Assets Administration's policy to retain title to property until it was turned over to a common carrier, at which time payment was due, (R. 38–39), (ii) that this policy was embodied in various provisions of War Assets' standard conditions of sale (R. 39), (iii) that War Assets understood the instant agreement to require that funds for full payment be deposited by respondent with the Dallas bank prior to any shipments (R. 39–40), (iv) that in War Assets' view respondent had never complied with these terms of the contract (R. 40–43), and (v) that had War Assets been willing to accept a letter of credit in place of the original agreement for cash, the one proffered by respondent would have been unsatisfactory for several reasons (R. 42–43).[7] Petitioner likewise filed an affidavit of W. T. Lennon, an employee

[7] The defects in respondent's letter of credit proposal were said to be (R. 42): (1) shipment in full was required by May 31, 1947, but no shipping instructions had been received, leaving War Assets without assurance of shipment in full by that date; (2) under the letter of credit payment was conditioned upon presentation of the original and duplicate of a letter from Penn-Pocahontas (the repurchaser) to respondent giving certain shipping instructions (R. 26), which letters War Assets had never seen or heard about; (3) the time for presentation, June 7th, might prove insufficient; and (4) the original letter of credit, which War Assets had never seen, had to be presented for each payment.

of the Administration, that prior to the institution of the action, personnel and equipment had been directed to Camp Maxey to load the coal for delivery to Midland Coal Company, and that the restraining order prohibiting the loading had damaged War Assets (R. 43–44).[8]

After argument on respondent's motion for a preliminary injunction (R. 48), the district court dissolved the temporary restraining order and denied the application for a preliminary injunction on the ground "that this suit is in effect a suit for specific performance and the United States is a necessary party, and this Court is without jurisdiction" (R. 48). After respondent's counsel indicated, in open court, his intention to appeal, the district court stated that "if you want to get a stay order from the Court of Appeals, I think you had better let me pass on the motion to dismiss, because I think this opinion so far decides that question" (R. 48), and sustained the petitioner's motion to dismiss (R. 48). The order, judgment, and decree, filed May 9, 1947, denied respondent's motion for a preliminary injunction, granted petitioner's motion to dismiss the complaint, and dismissed the complaint with prejudice (R. 49–50).[9]

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[8] Petitioner need not, and does not here, rely on the affidavits of Day and Lennon, since the question now presented arises on the allegations of respondent's complaint and the exhibits thereto.

[9] Delivery of the coal to another buyer was enjoined, first by the district court and then by the Court of Appeals, pend-

Appeal was taken to the United States Court of Appeals for the District of Columbia [10] which reversed and remanded the case, holding that the district court "erred in dismissing the complaint in the belief that it lacked jurisdiction" (R. 59). The Court of Appeals stated that "it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated" between the parties, and whether title had passed as alleged by respondent (R. 58). The court was also of the view that, if the contract had been breached by War Assets

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ing final disposition of the appeal to the latter court. Although the United States sought to have a $20,000 injunction bond given by respondent, the only protection to the United States consisted of an inadequate injunction bond of $1,000 (R. 50).

[10] In the Court of Appeals, respondent filed, together with a motion for leave to file, an affidavit of its president, never received by the district court, in opposition to the Lennon affidavit filed by petitioner in the district court (R. 51–54). This affidavit details respondent's version of its dealings with officials of the War Assets Administration, on and after April 18, 1947, and sets forth respondent's information as to the equipment and personnel directed by the Administration to Camp Maxey for the purpose of loading the coal. The court below never passed upon respondent's motion for leave to file this affidavit. We believe this affidavit to form no part of the true record in this case, since it was not filed in the district court nor received by the Court of Appeals. Moreover, we believe the affidavit to have no bearing on any question presented by this petition. For these reasons, petitioner did not seek to file answering affidavits, although several of the respondent's affidavit's statements are believed to be inaccurate. Cf. note 8, *supra*, p. 12.

Administration to respondent's detriment, "the peculiar nature of the coal involved soundly bases [respondent's] resort to equity for relief" (R. 58).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to hold that this suit is one against the United States to which the United States has not consented.

2. In failing to hold that the district court does not have jurisdiction of this suit.

3. In holding that the district court could not determine whether or not it had jurisdiction of this suit without a trial and a determination of respondent's allegations that title to the property had passed to it and that its contract had been breached to its detriment, and in holding that the district court has jurisdiction to try and determine those issues in this action.

4. In holding that petitioner's discretion was fully "exercised at the time the contract with appellant was entered into" (R. 58), and that he thereafter possessed no discretion in the matter.

5. In holding that the district court had equitable jurisdiction to grant the relief prayed for, that the respondent did not have a plain, adequate, and complete remedy at law, and that the nature of the coal involved was so "peculiar" as to warrant resort to equity for relief.

6. In reversing the judgment of the district court dismissing the complaint herein.

REASONS FOR GRANTING THE WRIT

The court below has, we submit, contrary to repeated decisions by this Court, held that a suit may be maintained against a government official, in his official capacity, to compel specific performance of a contract entered into by the United States. In so holding it apparently relied upon the recent opinion of this Court in *Land* v. *Dollar*, 330 U. S. 731, as overruling or disapproving prior decisions of the Court to the contrary, notwithstanding the specific disclaimer made in that opinion of any intention to reach such a result (330 U. S. at 737–738). If, however, the principle of *Land* v. *Dollar* is to be extended to suits for specific performance of government contracts on the plaintiff's naked allegation that title has passed, we submit that this should be done only after considered review by this Court.

1. (a) The history of this transaction, as revealed on the face of the complaint, shows that, in all but the defendant's name, the suit is one to compel specific performance by the United States of an agreement to sell certain government-owned coal to respondent. The coal was admittedly the property, and in the possession, of the United States, which duly entered into a conventional sales contract for its disposition. Before removal of the coal from the government's possession, a

dispute arose as to respondent's compliance with the payment requirements of the contract, and the Government refused delivery on the ground that respondent, having failed to fulfill its contractual obligation to make a single cash payment, thereby breached the agreement. As is usual in such cases, respondent contended that it had fully performed its undertakings, and that title had passed to it, while the Government, for its part, claimed both that respondent was in default and that full title remained in the United States. Asserting that the coal was unique and that damages would afford an insufficient remedy, the respondent then brought this action against the head of the government agency charged with the disposition of the coal, naming him solely in his official capacities and not as a private person, and omitting any allegation that he had any personal knowledge of the transaction (R. 1, 2). As if it were suing a recalcitrant private vendor for specific performance, respondent sought an injunction against the "cancellation of the sale to the plaintiff of this coal" and a decree that the "sale of this coal to the plaintiff * * * is still valid and in effect" (R. 8). "An injunction against the breach of a contract is a negative decree of specific performance of the agreement" (*Shubert* v. *Woodward*, 167 Fed. 47, 53 (C. C. A. 8)), and respondent's whole effort is plainly to compel the War Assets Administrator, as an official of the United States, to perform the United States' con-

tract by officially ordering his subordinates to load the 10,000 tons of coal upon receipt of respondent's shipping orders, and to accept payment to the United States as proffered by respondent."[11]

(b) The Court of Appeals should have dismissed this action, as did the district court, under the settled rule, consistently announced by this Court and the court below over the past sixty-five years, which denies to federal courts jurisdiction to entertain proceedings seeking an injunction or a writ of mandamus directing specific enforcement of a contract made by the sovereign, though the complaint nominally may be against an individual public official. *Louisiana* v. *Jumel*, 107 U. S. 711, 721; *Hagood* v. *Southern*, 117 U. S. 52, 68; *In re Ayers*, 123 U. S. 443, 502–503; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10–11; *Ex parte Young*, 209 U. S. 123, 151–152; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642; *Goldberg* v. *Daniels*, 231 U. S. 218; *Wells* v. *Roper*, 246 U. S. 335; *Ex parte New York*, 256 U. S. 490, 500; *Goltra* v. *Weeks*, 271 U. S. 536, 546; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; *Land* v. *Dollar*, 330 U. S. 731, 737; *United States ex rel. Shoshone Irr. Dist.* v. *Ickes*, 70 F. 2d 771 (App. D. C.), certiorari denied, 293 U. S. 571; *Trans-*

[11] Respondent's complaint also prayed (R. 9): "That, in view of the delay and disruption of arrangements caused by the purported cancellation, plaintiff shall have thirty days from the date of this Court's final order in which to give shipping instructions."

Continental & Western Air, Inc. v. *Farley*, 71 F. 2d 288, 290–292 (C. C. A. 2), certiorari denied, 293 U. S. 603; *Boeing Air Transport* v. *Farley*, 75 F. 2d 765, 768 (App. D. C.), certiorari denied *sub nom. Pacific Air Transport* v. *Farley*, 294 U. S. 728; *O'Harra* v. *Littlejohn*, 69 F. Supp. 274, 276 (D. D. C.).

The gist of this rule applying the bar of sovereign immunity to actions such as this, and the reasons for the Court's constant reaffirmation of the principle, were shortly put in *Ex parte Young*, 209 U. S. 123, 151, where, speaking of state contracts, this Court said: "The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State. * * * A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State." To secure relief in these cases the plaintiff must of necessity endow the defendant with official character, as respondent implicitly recognizes in the caption of its suit (R. 1, 2), and thus confess the sovereign as the real party in interest. Cf. *Cunningham* v. *Mason & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Hagood* v. *Southern*, 117 U. S. 52,

69–70; *Wells* v. *Roper*, 246 U. S. 335.[12] By the Tucker Act and the Federal Tort Claims Act, the sovereign has provided a forum which can award money damages against the Government for breach of contract or for certain types of tort, but, of course, the United States has not yet permitted itself to be sued for specific performance. *Land* v. *Dollar*, 330 U. S. 731, 737, and cases cited *supra* at pp. 17–18.

(c) There is nothing in the instant complaint setting this case beyond the reach of the established rule and the authoritative cases. Allegations that title has passed and that the would-be purchaser is now the "owner" of the property to be sold by the United States (R. 6–7) were held immaterial in 1913 in *Goldberg* v. *Daniels*, 231 U. S. 218, where this Court affirmed the dismissal of a similar suit.[13] Application of the sovereign

[12] An analogous principle is set forth in *Williams* v. *Fanning*, 332 U. S. 490, holding that a superior need not be joined in an action against his subordinate, where the judgment will expend itself on the subordinate alone and the superior will not be required to take new action either directly or indirectly through his subordinate. Conversely, in an action such as this, the defending public official cannot satisfy the plaintiff as a private person but must take new action on behalf of and as an agent of the United States. The United States is therefore either the real party in interest or an indispensable party defendant.

[13] The petition for writ of mandamus in *Goldberg* v. *Daniels*, *supra*, alleged (R. 4, No. 79, Oct. T. 1913): "13. And your petitioner claims that he is the true owner and entitled to immediate delivery of the possession of said cruiser *Boston* to him."

immunity bar should not turn on the pleader's use or misuse of technical doctrines of passage of title where the transaction is plainly a normal sales arrangement and the property remains in the possession of the United States which claims continued ownership in itself; in a suit against a public official to secure the goods, "the dominant interest of the sovereign" (*Land* v. *Dollar*, 330 U. S. 731, 738) would hardly be on the side of a plaintiff with no more than such a formal "property interest." Nor can petitioner be said to be a private tortfeasor interfering with respondent's property, as in *Land* v. *Dollar*, *supra*, at 736, 738, any more than an employee of a private corporation who cancels a similar contract in the name of and on behalf of his employer. There has been no personal misconduct on petitioner's part. Indeed, the complaint does not even allege that he had any knowledge of the transaction prior to the filing of the complaint. And, contrary to the Court of Appeals' intimations (R. 58), it is also settled that contracting officials of the Government do not normally exceed their authority when they misconstrue the terms of an agreement and thus cause an actionable breach by the Government. *Wells* v. *Roper*, 246 U. S. 335, 337–338; cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–132. Here, the War Assets Administrator had full statutory power to enter into a disposal contract on terms he saw fit (*supra*, pp. 3–4), and the breadth of his authority

proves that petitioner's official power was not limited to a correct interpretation of those contractual terms. The refusal to deliver the coal was thus an authorized act, though it may have resulted in a breach by the Government of the sales contract for which the United States might be held liable in the Court of Claims. Certainly it cannot even be said, in view of the petitioner's wide statutory authority and the parties' substantial dispute over the contract's meaning, that the War Assets' officials' duty to perform the agreement was plainly ministerial and non-discretionary, an indispensable prerequisite to any action for mandamus or a mandatory injunction. *Brashear* v. *Mason*, 6 How. 92, 102; *United States ex rel. International Contracting Co.* v. *Lamont*, 155 U. S. 303; *Goldberg* v. *Daniels*, 231 U. S. 218; *Wilbur* v. *United States*, 281 U. S. 206, 218–219.

(d) *Land* v. *Dollar*, 330 U. S. 731, itself supports the view that this is an action against the United States. The Court expressly distinguished an "attempt to get specific performance of a contract to deliver property of the United States" (330 U. S. at 737); and the general test laid down, there and in *Williams* v. *Fanning*, 332 U. S. 490, would designate this suit as one against the sovereign. For the "essential nature and effect of the proceeding" are such that the judgment sought by respondent would both "expend itself on the public * * * domain" and "interfere with the public administration," 330

U. S. at 738. Coal forming part of the United States' surplus stores, and in its custody, would be abruptly transferred out of its hands by court order. Under the decision below, disposal of such government surplus can be, and in this case, has been, stopped completely by temporary restraining orders or injunctions, and to that extent the aim of the Surplus Property Act of 1944 to foster speedy disposition of these assets is frustrated. Cf. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine* (1946) 59 Harv. L. Rev. 1060, 1075.[14] Moreover, the substitution of this type of injunctive proceeding for a statutory action under the Tucker Act deprives the United States of the protection of the latter's time and procedural provisions, with substantial detriment to the conduct of the Government's contract litigation.

2. The question is one of general importance which warrants decision here. The courts of the District of Columbia are the principal forum for suits against government agencies, and the decision below, with its implication that a public official misconstrues a government contract at his peril, will both invite and control a substantial body of litigation. Use of equity actions in dis-

[14] Even if restraining orders, injunctions, or stays are not issued, the mere pendency of the action may well prevent disposition of the property to the prejudice of efficient administration. Cf. *Jones* v. *Securities & Exchange Comm.*, 298 U. S. 1, 17–18.

putes arising from the disposal of government property has become quite frequent in the past year,[15] and the instant opinion will largely govern the proceedings in such cases. Its sweeping language will probably also find application in actions touching upon other areas of government procurement and distribution activity. The field of government contractual relations is preeminently one, in our view, where it is important that the waiver of immunity be not extended beyond the boundaries expressly authorized by Congress.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1948.

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[15] Several cases of this type have been brought in the District Court for the District of Columbia in the last nine months, and some in other districts, in most of which temporary restraining orders or stays were sought, and usually granted.